THE UNWORKABLE UNWORKABILITY TEST

LAUREN VICKI STARK*

In this Note, Lauren Vicki Stark argues that the Supreme Court's approach to overruling precedent based on "unworkability" is flawed and should be discarded. The Court has listed several factors that may constitute special justifications for overruling, including whether the precedent is "unworkable." This Note examines each of the cases in which the Court has relied on unworkability to overrule and highlights the problems with the Court's analysis. The author concludes that, rather than relying on unworkability to overrule its precedents, the Court could have clarified them or, in limited situations, applied the doctrine of justiciability instead.

INTRODUCTION

"[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"

—Payne v. Tennessee[1]

Despite the commands of stare decisis,[2] the Supreme Court has made clear that it does not feel "constrained to follow precedent"[3] when it finds evidence of prior error and a "special justification"[4] for overruling a prior decision. The Court has listed several factors that may constitute "special justifications" for overruling precedent, including whether the precedent is "unworkable."[5] Unworkability served as one of the justifications for overruling precedent in eight cases.[6]

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1 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

2 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (discussing use of stare decisis and its limitations).

3 *Smith*, 321 U.S. at 665.

4 *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (articulating "special justification" requirement but finding none in instant case).

5 *See, e.g.*, *id.* (mentioning "unworkability" as one of traditional justifications for overruling precedent).

6 Vieth v. Jubelirer, 541 U.S. 267 (2004); Hudson v. United States, 522 U.S. 93 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States v. Dixon, 509 U.S. 688 (1993); Payne v. Tennessee, 501 U.S. 808 (1991); Gulfstream Aerospace Corp. v. Mayacamas

Examination of six of these eight cases illustrates that unworkability is not a principled test. In three cases, the Court labeled precedent unworkable on the grounds that lower courts did not apply the precedent consistently, but the Court failed to supply any evidence of inconsistency.[7] In three other cases, unworkability lacked any independent significance. In particular, the Court either conflated the definition of unworkability with other reasons for overruling[8] or used unworkability as a makeweight.[9]

Regardless of whether the Court should have deviated from precedent in the eight cases that used unworkability as a justification for overruling prior decisions,[10] unworkability, a concept that the Court has never explicitly defined, should be discarded. Even if the Court had provided evidence of lower court inconsistencies, the Court could have granted certiorari and clarified its precedents, rather than overruling them. This approach is preferable to the unworkability doctrine, which undermines the legitimacy of the Court by allowing it to overrule precedents without providing a "special justification" and by raising concerns that the decision to overrule is driven by personnel changes in the Court's membership.

The unworkability doctrine, as presently conceived, rests on dubious support. Moreover, in certain circumstances, other doctrines may be able to address problems currently handled by unworkability.[11] In two of the eight cases, the Court noted that no manageable judicial standards existed and it therefore could not have simply clarified the precedents; the precedents established nonjusticiable tests. An inquiry into justiciability would have been another means to address these problems because, at bottom, they were cases that were inappropriate for judicial resolution.

Part I presents an overview of the principle of stare decisis and explains the reasons the Court has given for overruling precedent. Part II investigates the meaning of unworkability as it is used in the Court's decisions. Though "unworkability" has never been explicitly

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Corp., 485 U.S. 271 (1988); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Swift & Co. v. Wickham, 382 U.S. 111 (1965).

[7] *See infra* Part III.A (discussing *Seminole*, 517 U.S. 44; *Payne*, 501 U.S. 808; and *Swift*, 382 U.S. 111).

[8] *See infra* Part III.B.1 (discussing *Gulfstream*, 485 U.S. 271).

[9] *See infra* Part III.B.2 (discussing *Hudson*, 522 U.S. 93 and *Dixon*, 509 U.S. 688).

[10] *See supra* note 6.

[11] For a similar analysis based on the absurdity doctrine, see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). Manning argues that a contextual interpretation of statutory texts and a principled exercise of judicial review are more appropriate means to handle many problems otherwise subject to the absurdity doctrine. *See id.* at 2392–93.

defined, the Court seems to use the term when a precedent has produced lower court confusion. Part III highlights several problems with the unworkability doctrine, discussing the flawed application of the doctrine in six cases. Part IV argues that the doctrine should be abandoned, even if unworkability could be defined and measured, because lower court confusion is not a reason to overrule precedent. Part V concludes with an exploration of two instances in which the Court labeled the precedent unworkable even though nonjusticiability supplied an adequate reason for overruling.

Although a number of scholars have criticized the Court's overruling jurisprudence,[12] no comprehensive analysis of the unworkability doctrine exists. Authors either identify unworkability as one of several problems with the Court's approach to stare decisis[13] or mention unworkability in their discussions of a specific case.[14] There is no piece that offers close analysis of the Supreme Court cases in which a majority of the Court relied on unworkability to justify overturning prior precedent. This Note identifies a total of eight such "unworkability" cases[15] and focuses in detail on these eight cases in order to examine the specific problems of the unworkability doctrine.

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12 *See, e.g.*, Todd E. Freed, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1769, 1777–80 (1996).

13 *See, e.g.*, *id.* at 1791; David K. Koehler, *Justice Souter's 'Keep-What-You-Want-and-Throw-Away-the-Rest' Interpretation of Stare Decisis*, 42 BUFF. L. REV. 859, 886–87 (1994) ("There is no bright-line test as to what is workable, what constitutes sufficient reliance, or what constitutes legal evolution. In effect, Souter has created a tool whereby judges, except in rare, glaringly obvious cases, have the flexibility to decide to follow precedent at their own whim or fiat.").

14 *See, e.g.*, Michael Vitiello, Payne v. Tennessee: *A "Stunning Ipse Dixit,"* 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 179–208 (1994) (criticizing Court's approach to stare decisis in *Payne v. Tennessee*, 501 U.S. 808 (1991)).

15 A Westlaw search for cases containing the words "unworkable" or "unworkability" yields two hundred Supreme Court cases. However, only seventy-six of these cases label Supreme Court decisions as unworkable; most refer to lower court opinions, theories, or arguments as unworkable.

Although the Court has established unworkability as integral to stare decisis analysis, the most common reference to unworkability comes from dissenting and concurring Justices. Dissenting and concurring Justices often use unworkability to critique the majority opinion, asserting that the majority's rule will prove to be unworkable in the future. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting) ("[T]ime and experience may demonstrate . . . the unworkability of the majority's rules.").

Dissenting and concurring Justices often predict that a decision will be viewed as unworkable once courts struggle to interpret it. Alternatively, when disagreeing with a line of decisions, dissenting and concurring Justices often assert that a whole area of law has already proven to be unworkable. *See, e.g.*, Witte v. United States, 515 U.S. 389, 406 (1995) (Scalia, J., concurring) ("[T]his is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect.").

I
BACKGROUND: STARE DECISIS

Although stare decisis promotes several important interests, such as efficiency, stability, and legitimacy, the Court does not treat stare decisis as an "inexorable command."[16] The Court considers several factors in determining whether to overrule precedent, including whether a decision is "unworkable." This Part provides a brief overview of the context in which the unworkability doctrine operates before analyzing how the Court has applied it.

A. The Principles of Stare Decisis

Policies of efficiency, stability, and legitimacy underlie the proper treatment of precedent, as the Court has recognized.[17] Regarding the efficiency of a system of precedent, Judge Cardozo noted that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[18] Later courts can

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[16] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); *see also* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

[17] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652 (1999).

[18] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); *see also* Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989) (noting that stare decisis enables judges "to *avoid* having to rethink the merits of particular legal doctrine" in many cases).

One scholar claims that the law cannot function in a large group of people unless it embodies general principles capable of application to broad classes of people and acts. The use of precedent, according to this scholar, is one principal device for communicating general principles and standards to the public. *See* H.L.A. HART, THE CONCEPT OF LAW 121 (1961) (asserting that "general rules, standards, and principles must be the main instrument of social control" in any large group, "not particular directions given to each individual separately," and that precedent is one principal device for communicating such standards).

Scholars differ over the interests that stare decisis serves. This Note focuses on the three values of stare decisis that are most clearly implicated by unworkability. *See* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 627 (1990) (arguing that there are five justifications for stare decisis: stability, protection of reliance interests, efficiency in administration of justice, equality, and maintaining image of justice); Earl M. Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988) (arguing that there are four justifications for stare decisis: certainty and reliance, equality, efficiency, and appearance of justice and avoidance of arbitrary decisionmaking); Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1691–94 (1994) (surveying justifica-

rely on the wisdom of their predecessors rather than expending time and resources to readdress the same issues.[19] A doctrine of reliance on precedent supports the goal of stability by enabling parties to settle their disputes without resorting to courts.[20] Stare decisis also preserves the Court's legitimacy by furthering the public perception that its decisions are governed by the rule of law and not by the vagaries of the political process.[21] The Court has consistently cited these reasons to apply stare decisis.[22] Less clear, however, are the reasons for which the Court overrules precedent.

B. Special Justifications for Overruling Precedent

The Court has articulated various reasons for overruling a prior decision, most recently focusing on recognition of prior error and a "special justification."[23] The Court defined a set of "special justifica-

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tions for stare decisis, as well as criteria traditionally viewed as legitimate for overruling precedents); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (noting four common justifications for stare decisis: fairness, predictability, strengthened decisionmaking, and stability).

19 Schauer, *supra* note 18, at 599.

20 The most commonly heard justification for the doctrine of stare decisis is the need for certainty in the law. In planning their affairs, it is argued, people should be able to predict the legal consequences of their actions. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (declining to overrule *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), because baseball has "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation"); *see also* Lee, *supra* note 17, at 652–53 (explaining that policy of stability encompasses several related concerns such as enabling parties to settle their disputes without resorting to courts and reliance interests extending beyond commercial context); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985) (stating that predictability in judicial decisionmaking is key rationale for adhering to precedent).

21 Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 484. In Justice Thurgood Marshall's words, stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by preserving the presumption "that bedrock principles are founded in the law rather than in the proclivities of individuals." Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986); *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (suggesting that stare decisis preserves perception of "the judiciary as a source of impersonal and reasoned judgments"); Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 36 (2001) (asserting that people trust series of decisions more than individual judge's opinion because series of decisions reflects "collective" judgment); Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 493–94 (2003) (arguing that use of precedent legitimizes judges' opinions by showing that they are grounded in reasoning that does not change with change of Court personnel).

The legitimacy of the Court is linked to the perception that decisionmaking is just. *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 69–72 (1961) (noting link between fairness and binding precedent).

22 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

23 *See, e.g., id.* at 864.

tions" for overruling precedent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[24]

Although *Casey* upheld *Roe v. Wade*,[25] it is a touchstone for understanding the Court's approach to overruling precedent. *Casey* discusses the doctrine of stare decisis at length, constituting one of the Court's most extensive treatments of stare decisis in the last three decades.[26] The *Casey* Court explained that a wrongly decided decision should not be reversed without some special justification.[27]

Casey set forth several factors for deciding whether there is a special justification for overruling: (1) whether the prior decision has proven unworkable; (2) whether subsequent changes in the law make the prior rule an aberration; (3) whether the rule has engendered a "kind of reliance that would lend a special hardship to the consequences of overruling";[28] and (4) whether facts underlying the prior decision "have so changed" that the rule no longer adequately addresses the issues at hand.[29] The most significant aspect of this "special justification" approach is that it requires more than a conviction that the challenged precedent was wrongly decided.[30]

II
UNWORKABILITY AS A SPECIAL JUSTIFICATION TO OVERRULE PRECEDENT

As explained in Part I, unworkability is a "special justification" for overruling in cases of both constitutional and statutory interpretation.[31] This Part explores the meaning of unworkability as it has been

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[24] *Id.* at 854–55. For another example of a case defining the conditions requisite to overrule, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989). *Patterson* held that 42 U.S.C. § 1981 prohibited racial discrimination in private contracts and declined to overrule *Runyon v. McCrary*, 427 U.S. 160 (1976), for several reasons, among them that *Runyon* was not unworkable and did not upset "coherence and consistency" in § 1981 and Title VII law. *Id.*

[25] 410 U.S. 113 (1973). The *Casey* authors reaffirmed *Roe* despite the strong suggestion that it was wrongly decided: "[T]he stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have . . . ." *Casey*, 505 U.S. at 861.

[26] Dunn, *supra* note 21, at 507.

[27] *Casey*, 505 U.S. at 864.

[28] *Id.* at 854.

[29] *Id.* at 854–55.

[30] Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002).

[31] When reviewing a case of constitutional interpretation, rather than one of statutory interpretation, the Court has repeatedly averred a greater willingness to dispense with stare decisis. One of the most often cited explanations of the distinction between constitutional cases and statutory and common-law cases is found in Justice Brandeis's *Burnet v. Coronado Oil & Gas Co.* dissent. Justice Brandeis asserted, "[I]n most matters it is more

used in the Court's decisions. Although the Court has never clearly defined unworkability, unworkable precedents seem to be those that create confusion among lower courts and present difficulties in application. This Part then argues that the Court should define unworkability carefully so that when it departs from stare decisis, it does so on a clearly principled basis. This would help undercut the suggestion that the Court's departure is simply a result of changes in the composition of the Court.

A. The Meaning of Unworkability

Although unworkability remains a critical aspect of stare decisis jurisprudence,[32] the Court has not presented a clear definition of unworkability. The Court came closest to defining unworkability when it stated that unworkable decisions create "inherent confusion"[33] in the law and are a "positive detriment to coherence and consistency."[34] Therefore, a precedent seems to be unworkable when lower courts cannot apply it coherently and consistently.[35]

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important that the applicable rule of law be settled than that it be settled right." 285 U.S. 393, 406 (1932). But, he wrote, "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Id.* at 406–07.

This dichotomy rests on a simple justification mentioned by Brandeis. Congress can reverse the Court's statutory interpretation precedents with legislation; only the Court or a constitutional amendment can reverse constitutional precedents. Accordingly, the Court has applied a "super strong" presumption of correctness to precedents in statutory interpretation cases. *See* Hubbard v. United States, 514 U.S. 695, 711–12 (1995) ("Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation . . . .'") (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)). *See generally* Daniel M. O'Keefe, Comment, *Stare Decisis: What Should the Supreme Court Do When Old Laws Are Not Necessarily Good Laws? A Comment on Justice Thomas's Call for Reassessment in the Supreme Court's Voting Rights Jurisprudence*, 40 ST. LOUIS U. L.J. 261 (1996) (discussing "super strong" presumption).

Although the Court traditionally treats stare decisis differently in constitutional and statutory contexts, it has applied unworkability similarly in both areas. The Court first relied on the concept of unworkability to overturn a Supreme Court statutory interpretation precedent in *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court declared a constitutional precedent unworkable without making any distinction between statutory and constitutional contexts. 469 U.S. 528 (1985).

[32] In *Lawrence v. Texas*, the dissenting Justices scolded the majority for not considering whether the precedent had proven unworkable. 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) ("Gone, too, is any 'enquiry' (of the sort conducted in *Casey*) into whether the decision sought to be overruled has 'proven "unworkable."'") (citations omitted).

[33] Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

[34] *Id.*

[35] Hudson v. United States, 522 U.S. 93, 102 (1997) (precedent demonstrated to be unworkable after lower courts applied test); *cf.* Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 54 & n.7 (1978) (Powell, J., dissenting) (arguing that majority's decision raises number of local decisions that must be reviewed by Justice Department to unmanageable

The Court emphasizes that unworkability is an inquiry into the application of law "in practice"[36] rather than "in principle."[37] This formulation makes clear that unworkability is distinct from issues of principle. Similarly, the Court discusses precedents as unworkable in "operation"[38] or "application,"[39] making evident that problems in application differ from errors in law.

Perhaps the best way to explore the meaning of unworkability is to examine the decisions that the Court has declared workable or unworkable. The Court often mentions that a precedent has *not* proven to be unworkable as one of several reasons to uphold it.[40] As noted above, the Court has overruled precedent because of unworkability in eight cases. Part III criticizes the Court's reasoning in six of these eight cases, analyzing how each case reveals flaws in the unworkability doctrine.

B. Reasons Why the Court Should Define Unworkability

According to *Casey*'s discussion of stare decisis, a prior decision must be more than simply "wrong" to justify discarding it.[41] Whether

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volume); United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110, 147–48 (1978) (Stevens, J., dissenting) (same).

As one article explains, unworkable decisions include those that "lead[ ] to the specter of continuing splits in lower court decisions." R. Randall Kelso & Charles D. Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 997–1001 (1996) (citing *National League of Cities v. Usery*, 426 U.S. 883 (1976), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as cases that caused confusion in lower courts).

[36] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283–84 (1995) (O'Connor, J., concurring) (indicating that although *Southland Corp. v. Keating*, 465 U.S. 1 (1984), was wrongly decided, it had "not proved unworkable"); Rutan v. Republican Party of Ill., 497 U.S. 62, 110–11 (1990) (Scalia, J., dissenting) (opining that *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), were wrong *and* unworkable).

[37] *See, e.g.*, United States v. Dixon, 509 U.S. 688, 711 (1993) (asserting that *Grady v. Corbin*, 495 U.S. 508 (1990), "was a mistake" and, from practical standpoint, had "produced 'confusion'") (citation omitted).

[38] *See, e.g.*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 284 (1988) (stating that modern procedures of federal courts "render[ ] the rule hopelessly unworkable in operation").

[39] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 839–40 (1991) (Souter, J., concurring) (double jeopardy produces such "uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately individualizing sentencing for capital defendants").

[40] *See, e.g.*, *Dobson*, 513 U.S. at 272 (deeming exclusive arbitration rule workable and stating that "no unforeseen practical problems have arisen"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) ("Although *Roe* has engendered opposition, it has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has . . . required judicial assessment of state laws[,] . . . the required determinations fall within judicial competence.") (citation omitted).

[41] Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at

or not the Court should overturn precedent solely because it finds the precedent wrong, for unworkability to constitute a "special justification," it must mean more than erroneousness. If unworkability does not signify something other than erroneousness or something different from other "special justifications," it should be abandoned as a mere rhetorical device.

Similarly, unworkability should be discarded if it is simply a catch-all phrase for different reasons why a precedent should be overruled. One scholar defines unworkability broadly, stating that workability is a "question of whether the Court believes itself able to continue working within a framework established by a prior decision."[42] However, all of *Casey*'s "special justifications" raise the question of whether the Court should work within a precedent's framework. This imprecise definition does not help give meaning to unworkability.

Although the Court may use several criteria in determining whether to overrule precedent, the rules for the deployment of stare decisis must be precise enough so that it is possible to assess whether the Court has been faithful to its stare decisis principles.[43] The Court's invocation of "unworkability" has led critics to question the Court's motives in using such a vague, undefined term.[44] This criti-

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all)."). *Compare* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993) (arguing that plurality in *Casey* took conventional approach to stare decisis by requiring more than mere erroneousness to justify overruling), *with* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1552 (2000) ("[T]o the extent that workability is a pure policy consideration—that is, a reason for adhering to or departing from a precedent *apart* from a belief that it is right or wrong—it should be open to Congress to adjust that policy."). For the view that erroneousness alone, particularly when error is recent, suffices to justify overruling in constitutional cases, see *South Carolina v. Gathers*, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting).

For a discussion of the Court's conflicting approaches to perceived error in a past decision, see Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 235, which states that the "dominant characteristic of overruling opinions has been . . . the Court's consistent reliance upon more than just the alleged superiority of the views of its present membership as the basis for rejecting a precedent," and Lee, *supra* note 17, at 654–55.

[42] Paulsen, *supra* note 41, at 1552.

[43] *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 179 (1989) ("Because the current rule allows the Court to overrule precedents where there is some 'special justification,' a term which the Court has never clearly defined, it is often impossible to assess whether a decision has or has not been faithful to the stare decisis principle.").

[44] *See, e.g.*, Lee, *supra* note 17, at 658 (calling concept of unworkability "euphemistic label").

cism, in turn, feeds a general frustration with the Court's approach to stare decisis.[45]

Each act of overruling therefore must be done on a principled basis because each overruling potentially undermines the Court's legitimacy.[46] Stare decisis "conforms to the public's notion that Supreme Court Justices should be making impartial rules of law and not imposing their own morals on society."[47] As one academic notes, stare decisis "fosters the *appearance* of certainty and impartiality by providing a seemingly neutral source of authority to which judges can appeal in order to justify their decisions."[48] In other words, stare decisis allows the Court to appear impartial and limits the power of any one particular Justice to create rules of law based on personal preferences.

III

THE COURT'S UNPRINCIPLED APPLICATION OF THE UNWORKABILITY DOCTRINE IN SIX CASES

As a result of failing to define unworkability, the Court can and does use the doctrine selectively. It is therefore difficult to predict when the Court will label a precedent unworkable. Often the Court lists unworkability as one of several reasons to overturn a precedent without articulating exactly what made the precedent unworkable.

Furthermore, in three cases the Court declared a precedent unworkable because of lower court confusion, but did not present evidence supporting its claim. As applied in another three cases, unworkability is muddled with other reasons for overruling. This Note argues that these two flaws in the unworkability doctrine justify abandoning it.

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[45] *Id.* at 659 (indicating that contradictions in decisions have provided "ample fodder for the cynical response to the Rehnquist Court's doctrine of stare decisis").

[46] Dunn, *supra* note 21, at 506. In *Casey*, the Court asserted, "If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992). The Court concluded that overruling *Roe*, even assuming it was wrong, would come at "the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869.

[47] Padden, *supra* note 18, at 1693 & n.31; *see also* Maltz, *supra* note 18, at 368–72 (arguing that there exists widely shared belief in American politics that Court's decisions should not depend on personalities of its members).

[48] Maltz, *supra* note 18, at 372.

A. *Insufficient Evidence of Unworkability*

To prove that a precedent is unworkable, the Court often argues that there are inconsistent lower court opinions applying the precedent. However, in three cases, *Payne v. Tennessee*,[49] *Swift & Co. v. Wickham*,[50] and *Seminole Tribe v. Florida*,[51] the Court either offered little evidence of inconsistency or offered evidence of inconsistency that did not support the unworkability claim. Although the lack of citations to lower court decisions is not conclusive proof that there were no inconsistencies,[52] the Supreme Court should provide evidence for its claim that a particular decision is unworkable because it has produced inconsistent results.

1. Payne v. Tennessee

Payne v. Tennessee[53] is at the heart of the unworkability doctrine: It presents the most comprehensive explanation of the doctrine and is a rare source of support for the doctrine of unworkability.[54] Although *Payne* referred to other reasons for overruling two prior decisions that had prohibited victim impact evidence,[55] the Court relied heavily on the unworkability factor. *Payne* held that the Eighth Amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence, and, in so doing, overturned two recent decisions, *Booth v. Maryland*[56] and *South Carolina v. Gathers*.[57] Chief Justice Rehnquist concluded that the "'Court has never felt constrained to follow'" badly reasoned or unworkable precedent.[58]

Based solely on three cases, Rehnquist declared that *Booth* and *Gathers* "have been questioned by Members of the Court in later

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[49] 501 U.S. 808 (1991).

[50] 382 U.S. 111 (1965).

[51] 517 U.S. 44 (1996).

[52] For example, there may have been inconsistencies not mentioned by the Court. The Court may not have documented the inconsistencies or may have learned about difficulties in applying the precedent through informal networks.

[53] 501 U.S. 808 (1991).

[54] Three of the eight cases cite to *Payne* in their discussions of unworkability; the other five cases do not cite to any cases when describing the unworkability doctrine. *Payne* itself cites to *Smith v. Allwright*, 321 U.S. 649, 665 (1944), which overruled precedent and declared unconstitutional a political party resolution limiting membership to white citizens qualified to vote. 501 U.S. at 827.

[55] In addition to the precedents' unworkability, the Court overruled these precedents because they were erroneously decided and did not involve strong reliance interests. 501 U.S. at 828.

[56] 482 U.S. 496 (1987).

[57] 490 U.S. 805 (1989).

[58] *Payne*, 501 U.S. at 827 (quoting *Smith*, 321 U.S. at 665).

decisions and have defied consistent application by the lower courts."[59] His evidence, however, is easily dismantled.[60] Rehnquist cited only one lower court decision, the concurrence in *State v. Huertas*,[61] to demonstrate that the cases defied consistent application.[62] The concurring opinion in *Huertas* announced that since the majority and dissenting opinions interpreted *Booth* and *Gathers* differently, uncertainty in the law had been demonstrated.[63] This reasoning is flawed: Dissenting Justices always interpret the law differently from those in the majority.[64] Disagreement among members of the court cannot alone indicate uncertainty in the law, otherwise nearly every precedent could be declared unworkable.[65]

To support the assertion that members of the Court had questioned the precedents, Rehnquist listed two cases:[66] his own dissent in *Mills v. Maryland*[67] and Justice O'Connor's dissent in *South Carolina v. Gathers*.[68] "The[se] citations would have had a greater impact had Chief Justice Rehnquist and Justice O'Connor joined in the majority in *Booth* and *Gathers* and then come to the realization that their decisions were incorrect."[69] Furthermore, Rehnquist's dissent in *Mills v. Maryland* did not mention any inconsistent application of *Booth* by the lower courts. The *Payne* Court thus did not present compelling evidence that the precedent had produced lower court inconsistency.

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[59] *Payne*, 501 U.S. at 829–30.

[60] *See* Ranae Bartlett, Note, Payne v. Tennessee: *Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561, 581–84 (1992) (criticizing Court's finding that *Payne* was unworkable).

[61] 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area."), *cert. dismissed as improvidently granted*, 498 U.S. 336 (1991).

[62] One of the reasons the Court could not marshal evidence of unworkability is because the Court was overturning a two-year-old decision. Until *Payne*, the shortest period of reversal for a decision based in constitutional law was three years. *See* United States v. Scott, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)), *on remand*, United States v. Scott, 579 F.2d 1013 (6th Cir. 1978). "[T]he Court in *Scott* gave as a special justification for overturning *Jenkins*, the fact that they were bringing a decision into agreement with experience and newly ascertained facts." Bartlett, *supra* note 60, at 577.

[63] *Huertas*, 553 N.E.2d at 1070 (Moyer, C.J., concurring).

[64] Bartlett, *supra* note 60, at 582–83.

[65] *Id.* at 583 (quoting Payne v. Tennessee, 501 U.S. 808, 850 (1991) (Marshall, J., dissenting)).

[66] *Payne*, 501 U.S. at 830.

[67] 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).

[68] 490 U.S. 805, 812 (1989) (O'Connor, J., dissenting).

[69] Bartlett, *supra* note 60, at 582.

2. Swift & Co. v. Wickham

In *Swift & Co. v. Wickham*,[70] the Court also failed to provide evidence establishing the precedent's unworkability. *Swift* overruled *Kesler v. Department of Public Safety*,[71] a case that had been decided only three years earlier.[72] In *Kesler*, the Court formulated a test to determine when a district court panel of three judges should hear cases alleging conflicts between state and federal laws under 28 U.S.C. § 2281.[73] Section 2281 bars a suit for an injunction against the enforcement of a state statute "upon the ground of . . . unconstitutionality . . . unless the application therefor is heard and determined by a district court of three judges . . . ."[74] Cases so heard are reviewable on direct appeal to the Supreme Court.[75]

Kesler held that if the unconstitutionality of a state law is in "immediate controversy,"[76] a three-judge court is proper; if the immediate issue is one of "statutory construction even though perhaps eventually leading to a constitutional question,"[77] a three-judge court is improper.[78] Finding this standard—whether a claim is one of preemption or statutory interpretation—to be too subjective and a waste of resources, the *Swift* Court rejected it and held that a three-judge court did not have to be convened if the question was one of preemption.[79] *Swift* concluded that the *Kesler* rule was in practice unworkable and asserted that "the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."[80] Not only had commentators "uniformly criticized" it,

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70 382 U.S. 111 (1965).

71 369 U.S. 153 (1962).

72 *Swift*, 382 U.S. at 125–26.

73 *Kesler* held that three-judge district courts were necessary under 28 U.S.C. § 2281 "only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated." *Swift*, 382 U.S. at 115.

74 28 U.S.C. § 2281 (1958).

75 *Kesler*, 369 U.S. at 156.

76 *Id.* at 157.

77 *Id.* at 158.

78 *The Supreme Court, 1961 Term—Federal Jurisdiction and Procedure*, 76 HARV. L. REV. 168, 169 (1962).

79 "The *Swift* district court had been unable to resolve just how much statutory construction was necessary to trigger the *Kesler* rule." Lee, *supra* note 30, at 589. Rather than deciding the "elusive" question of just how much statutory interpretation in a case was enough to deprive the three-judge court of jurisdiction, the Supreme Court overruled *Kesler* in its entirety. Swift & Co. v. Wickham, 382 U.S. 111, 115–16 (1965). Although the *Kesler* test may be justified in the abstract, *Swift* emphasized that the test was not practical: "Such a formulation . . . cannot stand as an every-day test for allocating litigation between district courts of one and three judges." *Id.* at 125.

80 *Swift*, 382 U.S. at 116.

according to the Court, but lower courts had sought to "avoid dealing with its application" or "interpreted it with uncertainty."[81]

Despite this rhetoric, *Swift* did not present convincing evidence of lower court inconsistencies or problems. To support the unworkability label, *Swift* cited two lower court cases that failed to apply the *Kesler* rule. An Eighth Circuit case raised the question of whether *Kesler* required a three-judge court when the case only involved preemption.[82] The court of appeals did not try to answer this question and instead decided the case on other grounds.[83] Another case asserted that, because of the existence of constitutional claims, 28 U.S.C. § 2281 applied.[84]

The mere fact that these two cases raised the question of whether the three-judge rule applied and then decided the cases on other grounds does not by itself signify that *Kesler* was unworkable in the sense of producing lower court confusion. In order to accept the premise that lower courts "avoid[ed] dealing with [*Kesler*'s] application,"[85] it would have been helpful for the Court to explain that the rule *should* have been applied in these two lower court cases. Yet the Court did not provide this explanation.

3. Seminole Tribe v. Florida

In *Seminole Tribe v. Florida*,[86] the Court went a step further than in *Payne* and *Swift* by explaining what made the precedent unworkable: The precedent that *Seminole Tribe* overruled was a plurality decision. *Seminole Tribe*, however, suffers from the same underlying problem as *Payne* and *Swift*—lack of evidence proving unworkability in the sense of impracticability.

Seminole Tribe overruled as unworkable *Pennsylvania v. Union Gas Co.*,[87] which had held that Congress had the power under the Commerce Clause to abrogate a state's Eleventh Amendment immunity so long as it expressed a "clear statement" of its intent to do so.[88]

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[81] *Id.* at 124.

[82] *See* Borden Co. v. Liddy, 309 F.2d 871, 874 (8th Cir. 1962).

[83] *See id.*

[84] Am. Travelers Club, Inc. v. Hostetter, 219 F. Supp. 95, 102 & n.7 (S.D.N.Y. 1963) (declining to answer whether plaintiff's claims raised "'issues of statutory construction . . . perhaps eventually leading to a constitutional question'" or "'sole, immediate constitutional question'" within *Kesler* rule) (citing Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 158 (1962)).

[85] *Swift*, 382 U.S. at 124.

[86] 517 U.S. 44 (1996). For an extended discussion of the opinion, see Philip W. Berezniak, *Recent Decision*, 35 DUQ. L. REV. 741 (1997).

[87] 491 U.S. 1 (1989).

[88] *Union Gas* found that unless the states could be held liable for certain damages, the power of Congress to regulate interstate commerce would be diminished. *Id.* at 19–20.

According to the *Seminole Tribe* Court, *Union Gas*'s unworkability stemmed from the lack of a majority opinion. Justice White's *Union Gas* concurrence agreed with the judgment reached by Justice Brennan's plurality opinion,[89] but his refusal to sign on to Justice Brennan's rationale left lower courts to wonder whether the clear statement principle was good law.[90] Under these circumstances, *Seminole Tribe* suggested that *Union Gas* was ripe for reversal, "largely because a majority of the Court expressly disagreed with the rationale of the plurality"[91] and "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"[92] The Court declared that "*Union Gas* ha[d] created confusion among the lower courts that sought to understand and apply the deeply fractured decision."[93]

The contention that *Union Gas*'s fractured decision had confused the lower courts was barely substantiated.[94] The only evidence of confusion that the Court presented was the Eleventh Circuit's opinion below and one other court of appeals decision. In fact, "the lower court decisions had virtually unanimously read *Union Gas* to permit Congress to abrogate immunity when acting under not only its commerce power, but any of its enumerated powers; the only court of appeals to rule otherwise was the Eleventh Circuit in *Seminole*."[95] There was therefore no evidence of lower court confusion supporting the unworkability label.

Seminole concluded that the Court's decision in *Union Gas* was contrary to Eleventh Amendment precedent: "[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole*, 517 U.S. at 72–73. *Seminole* held that the Commerce Clause could not be used to abrogate states' Eleventh Amendment immunity. *See* C. Shannon Bacon, *The Indian Gaming Regulatory Act: What Congress Giveth, the Court Taketh Away*—Seminole Tribe of Florida v. Florida, 30 CREIGHTON L. REV. 569, 576–77, 604 (1997) (criticizing *Seminole* for declaring part of Indian Gaming Regulatory Act unconstitutional).

89 *See Union Gas*, 491 U.S. at 45.

90 *See Seminole*, 517 U.S. at 64 (referring to lower court opinions which had interpreted White's concurrence as casting doubt on validity of *Union Gas*).

91 *Id.* at 66.

92 *Id.* at 63 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

93 *Id.*

94 Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 29.

95 *Id.* at 29 & n.131–33. Meltzer notes that the critical change since *Union Gas* was the Court's membership: "Justices Brennan, White, Marshall, and Blackmun, all supporters of abrogation in *Union Gas*, had been replaced by Justices Souter, Ginsburg, and Breyer, who were like-minded on this issue, and by Justice Thomas, who was not . . . ." *Id.* at 29–30.

B. *Unworkability Muddled with Other Reasons for Overruling*

In the case discussed above, the Court alluded to lower court confusion as evidence of unworkability. In another three of the eight cases in which the Court invoked unworkability to overrule precedent, the Court did not discuss lower court inconsistencies. Rather, the Court either conflated the unworkability doctrine with a different "special justification" or used the charge of unworkability to add weight to its conclusion that the precedent was wrong. This failure violates the framework established in *Casey*, in which unworkability is a special justification separate from the other conditions that justify overruling a precedent.

1. *The Court Conflates Unworkability with Subsequent Legal Development:* Gulfstream Aerospace Corp. v. Mayacamas Corp.

Although the Court has generally applied the unworkability label to cases that cannot be interpreted consistently,[96] in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,[97] the Court equated unworkability with another "special justification" for overruling: subsequent legal development. As outlined in *Casey*, unworkability is, in theory, a "special justification" separate from prior error, subsequent legal development, factual change, and reliance interests.[98]

Gulfstream overturned the *Enelow-Ettelson*[99] doctrine because it had been undermined by subsequent legal developments. The *Enelow-Ettelson* doctrine stood for the proposition that a grant or denial of a stay for the determination of an equitable defense was immediately appealable if the underlying action was at law, but not if the suit was in equity.[100] The *Gulfstream* Court declared the doctrine

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[96] *See supra* Part II.A.

[97] 485 U.S. 271 (1988).

[98] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

[99] Ettelson v. Metro. Life Ins. Co., 317 U.S. 188 (1942); Enelow v. N.Y. Life Ins. Co., 293 U.S. 379 (1935).

[100] The *Enelow-Ettelson* doctrine adopted the legal fiction that, because an order from a chancellor staying an action at law traditionally took the form of an injunction, a stay based upon an equitable defense should be treated as an injunction. *See Gulfstream*, 485 U.S. at 283 (explaining why *Enelow-Ettelson* doctrine is "total fiction" in "modern world of litigation"). The doctrine had little relation to reality and was "divorced from any rational or coherent appeals policy." Lee v. Ply*Gem Indus., 593 F.2d 1266, 1269 (D.C. Cir. 1979).

Federal appellate courts characterized *Enelow-Ettelson* as "a remnant from the jurisprudential attic," Danford v. Schwabacher, 488 F.2d 454, 455 (9th Cir. 1973), and "an anachronism wrapped up in an atavism," Hartford Fin. Sys. v. Fla. Software Servs., 712 F.2d 724, 727 (1st Cir. 1983). For a detailed discussion of the difficulties posed by the *Enelow-Ettelson* doctrine, see 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3923 (2d ed. 1996).

"sterile and antiquated" and held that it could not be justified in light of the merger of law and equity accomplished by the Federal Rules of Civil Procedure.[101] The criticism was traceable to the necessity of distinguishing between the legal and equitable claims, defenses, and counterclaims when the underlying system of law and equity courts no longer existed. Conceding that the law-equity distinction had "bred a doctrine of curious contours,"[102] *Gulfstream* concluded that the rule was "unworkable and arbitrary in practice."[103]

Gulfstream labeled the precedent unworkable because it had been undercut by changes in the law. The Court thereby merged two distinct factors—unworkability and subsequent legal development. In its general discussions of stare decisis, however, the Court treats unworkability and legal development as unique factors.[104] Unworkability is unnecessary if it merely repeats the "subsequent legal development" factor.

2. *Unworkability as a Makeweight*

Another problem with the unworkability doctrine is that the Court uses unworkability as a makeweight—that is, something of little independent value thrown in to add weight to the Court's conclusion that the precedent was wrong. In two cases, *United States v. Dixon*[105] and *Hudson v. United States*,[106] the Court presented the unworkability of decisions as proof that they were wrongly decided. This use of the doctrine raises the question of whether unworkability is a pretext for overruling a decision that the Court later finds to be wrong.[107]

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101 *Gulfstream*, 485 U.S. at 287. The Court noted that an order by a federal court that relates only to the conduct of litigation before that court ordinarily *is not considered an injunction* and is not appealable. *Id.* at 279. Piecemeal appeals were no longer permitted pursuant to the fiction that, under a system in which law and equity have been merged, a judge will be deemed to have issued or denied an injunction if he stays or declines to stay proceedings before him. *See* Steele v. L.F. Rothschild & Co., 864 F.2d 1, 2 (2d Cir. 1988) (discussing *Gulfstream* holding).

102 *Gulfstream*, 485 U.S. at 280.

103 *Id.* at 283.

104 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (making clear that "unworkability" is distinct from legal development and that each factor may constitute special justification for overturning decision).

105 509 U.S. 688 (1993).

106 522 U.S. 93 (1997).

107 One scholar notes that unworkability may help identify incorrect cases. *See* Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 16–17 (2001) ("When a precedent is wrong, the gravitational pull of the correct constitutional interpretation may make judges eager to distinguish the precedent, thus producing intricate and unworkable doctrine. . . . [T]his suggests that stare decisis may assist in identifying the correct interpretation.").

According to the framework outlined in *Casey*, unworkability is not merely evidence of error.

a. *United States v. Dixon*

In *United States v. Dixon*,[108] the Court invoked error as the basis for reversal but masked that it was doing so by stating that the precedent was unworkable.[109] *Dixon* overruled *Grady v. Corbin*,[110] which had announced a "same conduct" test under the Double Jeopardy Clause.[111] The *Grady* test prohibited more subsequent prosecutions than under the preceding standard, known as the *Blockburger* test.[112] The *Blockburger* test had prohibited subsequent prosecutions if the second charge was based on the same elements.[113] *Dixon* discarded *Grady*'s formulation and returned to the *Blockburger* test.

The *Dixon* majority asserted that *Grady* was "unstable in application"[114] and that the Court was not constrained to follow unworkable precedent.[115] The Court noted that it had recognized a "large exception" to *Grady*'s principle, lower courts had complained that *Grady* was "difficult to apply," and Supreme Court decisions interpreting *Grady* had resulted in divided opinions.[116]

Dixon treated the perceived unworkability of *Grady* as evidence of its error.[117] While lower courts complained about applying *Grady*, they had interpreted it consistently. Ultimately, then, the majority's reasoning can be reduced to the conclusion that "[t]he case was a mistake."[118] The assertion that *Grady* was "unworkable or . . . badly reasoned"[119] did not appear to accord independent significance to the notion of unworkability.[120] According to the *Casey* standard, the Court should ground its overruling on both the erroneous reasoning of a prior decision and a "special justification." However, the *Dixon*

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108 509 U.S. 688 (1993).

109 Lee, *supra* note 17, at 657. For an extended discussion of how *Dixon*'s reversal can be understood in economic terms, see Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 668–74 (2000) [hereinafter Lee, *Economic Analysis*].

110 495 U.S. 508 (1990).

111 *Id.* at 522.

112 *Id.* at 510.

113 Blockburger v. United States, 284 U.S. 299, 304 (1932).

114 United States v. Dixon, 509 U.S. 688, 709 (1993).

115 *Id.* at 712.

116 *Id.* at 709, 711 n.16.

117 Lee, *supra* note 17, at 658.

118 *Dixon*, 509 U.S. at 711.

119 *Id.* at 712 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

120 Lee, *supra* note 17, at 658.

Court lacked a special justification and overruled simply based on a finding of prior error.

b. *Hudson v. United States*

In another double jeopardy case, *Hudson v. United States*,[121] the Court similarly found its precedent to be erroneous and labeled it unworkable.[122] *Hudson* overruled *United States v. Halper*,[123] which held that a civil sanction that serves either retributive or deterrent purposes is punishment.[124] Rejecting *Halper*'s emphasis on whether repetitive punishment exists irrespective of whether such punishment is civil or criminal in nature, the *Hudson* Court stated, "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense."[125]

Hudson is yet another example of a case where the Court applied the unworkability doctrine in an unprincipled fashion. *Hudson* stated: "As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable."[126] The Court, however, did not list any of these "subsequent cases" and only referred to its own subsequent precedent, which

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121 522 U.S. 93 (1997).

122 *Id.* at 102.

123 490 U.S. 435 (1989).

124 *Id.* at 448. *Halper* noted that "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Id.* at 440 (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). Rather than examining whether multiple *criminal* punishments were involved in the case before it, the *Halper* Court suggested that "in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. The Court interpreted the Double Jeopardy Clause to prohibit not only successive criminal punishments, but "merely punishing twice," *id.* at 443, and proceeded to hold that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 448. It stated, "[U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448–49.

125 *Hudson*, 522 U.S. at 99. *Hudson* noted that *Halper* deviated from the traditional double jeopardy analysis in two respects. First, it did not inquire whether the successive punishment is a "criminal" punishment, but held instead that the imposition of any sanction grossly disproportionate to harm is punishment subject to double jeopardy constraints. *Id.* at 101. Second, *Halper* focused on the assessment of the character of the sanctions rather than on an evaluation of the statute on its face. *Id.* In determining whether a punishment labeled civil is in reality criminal for double jeopardy purposes, *Hudson* applied the seven-factor test adopted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). *Hudson*, 522 U.S. at 99.

126 *Hudson*, 522 U.S. at 101–02.

demonstrated simply that the Court had disagreed with its own holding. This proof reveals that the Court found its prior decision wrong and that perhaps a "subsequent legal development" undermined the precedent. The Court's assertion that the precedent was unworkable does not qualify as a "special justification" separate from a finding of prior error.

IV
THE UNWORKABILITY DOCTRINE SHOULD BE ABANDONED

Although the Court has seemingly relied on unworkability as an objective basis for departing from precedent, in the cases discussed above, it did not present evidence of lower court inconsistencies. This lack of evidence could largely be addressed by requiring specific support of lower court inconsistencies to justify the unworkability label.

There are, however, deeper problems with the unworkability doctrine. Even if the Court had presented evidence of lower court inconsistencies, this evidence would not be a legitimate basis for the Court to overrule a precedent. Lower court confusion is a reason to grant certiorari and clarify precedent, not to overrule.

A. How Much Inconsistency Is Too Much?

Assuming that unworkable decisions are ones that produce lower court confusion, the Court seldom offers "any explanation of the significance of the apparent 'confusion' . . . much less a basis for their competing views of the level of confusion necessary to justify a change in precedent."[127] The evidence upon which the Court relies to prove unworkability—inconsistent lower court opinions—raises the question of how many inconsistent results are needed to prove unworkability, and how much time the Court should allow before overturning an unworkable precedent. Finally, the Court has not distinguished situations in which a precedent has created confusion from those in which the precedent was simply resisted by lower courts. As one scholar notes, "Lower court's [sic] distaste for a decision may lead to unsympathetic interpretation, not reasonably supported by the original Supreme Court decision."[128]

Nearly every time the Court relies on unworkability to overturn a precedent, the dissenting Justices respond that there is not enough evi-

[127] Lee, *Economic Analysis*, *supra* note 109, at 669. Lee instead proposes an economic model as a substantive basis for the Court's suggestion that unworkable precedents are particularly vulnerable to reversal. *Id.* at 705.

[128] Vitiello, *supra* note 14, at 201.

dence of confusion to support the claim that it is unworkable. For example, the dissenting Justices in *Payne*[129] attacked the majority for labeling the precedent unworkable based on insufficient evidence of disagreement among lower courts. Justice Marshall stated that there was only "feeble" evidence to support the assertion that lower courts could not apply the two cases consistently.[130] Asserting that only one single lower court had difficulty applying the precedents, Marshall wrote:

> Obviously, if a division among the members of a single lower court in a single case were sufficient to demonstrate that a particular precedent was a "detriment to coherence and consistency in the law," there would hardly be a decision in United States Reports that we would not be obliged to reconsider.[131]

He concluded that the only reason for the Court's decision was that the Court's personnel had changed.[132]

Similarly, Justice Douglas dissented in *Swift*, stating that he was unable to find a justification for overturning *Kesler*.[133] The majority, he suggested, had simply attached the label "unworkable" without showing that *Kesler* had "thrown the lower courts into chaos."[134] He asserted that there was not much disagreement among lower courts and that the majority could only find three cases to support its claim of unworkability.[135] He chastised, "The Court's failure to provide more compelling documentation for its indictment of *Kesler* is not the result of less than meticulous scholarship," it is because "there are no cases . . . remotely warranting the conclusion that *Kesler* is unworkable."[136] Douglas asserted that "gloomy predictions contained in a handful of law review articles" are insufficient support for overruling precedent on grounds that it is unworkable in practice.[137]

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129 *See supra* Part III.A.1.

130 Payne v. Tennessee, 501 U.S. 808, 849–50 (1991) (Marshall, J., dissenting).

131 *Id.* at 850 (internal citation omitted).

132 *Id.*

133 Swift & Co. v. Wickham, 382 U.S. 111, 133–34 (1965) (Douglas, J., dissenting); *see also supra* Part III.A.2.

134 *Swift*, 382 U.S. at 134.

135 *Id.*

136 *Id.* (internal quotations omitted).

137 *Id.* at 135. Also, in *United States v. Dixon*, 509 U.S. 688 (1993), the question whether the precedent was sufficiently unworkable so as to justify overruling was a point of disagreement between the majority and dissent. *Id.* at 759 (Souter, J., dissenting in part). The dissenting Justices claimed that the Court did not prove enough confusion among lower courts and undervalued the importance of stare decisis. *Id.* In response to the Court's evidence of confusion, the dissent asserted that this was not the "type of 'confusion' that can somehow obviate our obligation to adhere to precedent." *Id.* at 760 (citation omitted). For a discussion of *Dixon*, see *supra* Part III.B.2.a.

These criticisms rest on the assumption that a precedent's unworkability can be measured; the Court merely failed to present enough evidence of lower court inconsistencies. However, even if there existed a principled test to decide when there is sufficient lower court confusion to qualify a precedent as unworkable, the unworkability doctrine should still be abandoned. As the following section discusses, lower court confusion is not a reason that independently supports overruling because the Court can clarify the precedent instead. The Court can respond to confusion and still adhere to the principles of stare decisis.

B. Inconsistency Supplies a Reason to Grant Certiorari, Not to Overrule

There are some well-established general standards that are supposed to guide the Court in granting certiorari, one of which is lower court confusion. The Court's Rule 10 notes the circumstances or "character of the reasons" which help, but do not control, the decision to grant certiorari.[138] Foremost among the factors enumerated are conflicts in decisions on federal questions between the lower courts (both federal and state).[139] For example, in *Hudson*, the Court granted certiorari to clarify lower court confusion.[140] Thus, the Supreme Court has the ability to resolve disputes among lower courts and, at the same time, provide for uniformity in the application of precedent.[141]

One might argue that lower court confusion supports both the granting of certiorari and the overruling of precedent. After all, according to *Casey*, the Court does not rely on lower court confusion alone to overrule; it is a special justification applied only after the Court decides that the precedent is erroneous. Further, the Court

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138 SUP. CT. R. 10.

139 *See* ROBERT L. STERN ET AL., SUPREME COURT RULES, THE 1997 REVISIONS, 81–82 (1997) (explaining factors weighed when considering whether to grant certiorari).

140 *See* Hudson v. United States, 522 U.S. 93, 98 (1997) (indicating that certiorari had been granted because of concerns regarding "wide variety of novel double jeopardy claims"). One scholar illustrates the point:

> Assume that the Fifth Amendment expressly spelled out both the "same conduct" and the "same element" standards as tests for double jeopardy. Under those circumstances, the presence of confusion or instability in application of the same conduct test might call for greater clarity in the Supreme Court's explication of the test, but it would hardly be cause for abandonment of the plain language of the Fifth Amendment.

Lee, *supra* note 17, at 658 n.58.

141 *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 329 (1986) ("Because of the inconsistent approaches taken by lower courts . . . and the apparent lack of adequate guidance from this Court, we granted certiorari.").

should not be compelled to uphold precedent that has created inconsistency in the law because this effect only undermines the very purposes of stare decisis (i.e., promoting consistency in the law).

Support for the unworkability doctrine based on this reasoning is flawed. Supreme Court cases frequently require refinement and often produce inconsistent results among lower courts.[142] Because of this fact, conflict among courts about the meaning of a Supreme Court decision should not alone be sufficient to justify its overruling.[143] Justice Holmes warned against expecting legal rules to operate with the precision of mathematical formulae.[144] As Justice Powell has explained, "the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution."[145] It is the task of the Supreme Court to reconcile differences in lower court decisions.[146]

Ambiguity in the law will always exist because of the inherently ambiguous nature of textual interpretation. Overruling based on lower court inconsistencies downplays the courts' ability to struggle with ambiguity. Disagreement among courts means that there needs to be more interpretation, which the Supreme Court can supply. In this way, the Court would still be faithful to precedent.

V

WHERE NONJUSTICIABILITY DOES THE WORK OF UNWORKABILITY

The previous Parts examined the reasons why the unworkability doctrine should be discarded. In the six cases discussed, the Court combined two questions: "How should the Court identify problematic precedent?" and "What should the Court do once it has identified it?". Although inconsistent lower court decisions may reveal problematic precedent, this does not necessarily require overruling. Instead, the Court could grant certiorari and clarify the precedent. In two of the eight cases, however, the Court could not have simply clarified the precedent.

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142 *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 4.3–.4, at 225–32 (8th ed. 2002); *see also* SUP. CT. R. 10(a) (explaining that Supreme Court may grant certiorari in order to clarify conflict between courts of appeals).

143 Vitiello, *supra* note 14, at 207.

144 *See* O. W. HOLMES, THE COMMON LAW 1 (1881).

145 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 562 (1985) (Powell, J., dissenting).

146 Bernard Schwartz, National League of Cities *Again—R.I.P. or a Ghost That Still Walks?*, 54 FORDHAM L. REV. 141, 151 (1985) (criticizing *Garcia*, 469 U.S. 528).

In these cases, *Garcia v. San Antonio Metropolitan Transit Authority*[147] and *Vieth v. Jubelirer*,[148] the Court could have overruled on the grounds of nonjusticiability. The reasoning in these cases suggests that the Court wanted to extract itself from the entire areas of law at issue because the Court faced issues it found itself institutionally incapable of handling. In these areas, the Court must overrule because it cannot establish any remedy within the judiciary's competence. Although nonjusticiability is not a comprehensive alternative to unworkability, in these cases, unworkability is doing work already covered by the nonjusticiability doctrine. In other words, discussion of unworkability adds nothing to the analysis.

A. How the Nonjusticiability Doctrine Applies

The issue of judicial manageability emerged in *Baker v. Carr*,[149] where the Court held that the absence of "judicially discoverable or manageable standards" was one of four reasons for the courts to declare a controversy a nonjusticiable political question.[150] Nonjusticiability is used to describe issues the Court is not institutionally qualified to answer.

In the two cases discussed below, the breakdown of the law revealed that the Court could not adopt judicially administrable standards. In these cases, there was no remedial scheme that courts could have implemented that would not have made them political actors. Instead of relying on unworkability, the Court could have appropriately labeled the issues nonjusticiable.[151]

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147 469 U.S. 528 (1985).

148 541 U.S. 267 (2004).

149 369 U.S. 186, 217 (1962).

150 According to the political question doctrine, the courts should not intervene in a matter that (1) is left to a coordinate branch by the text of the Constitution; (2) requires a policy determination beyond institutional competence of the courts; (3) is best handled by another branch; or (4) is incapable of implementation. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

151 Although many commentators have criticized the political question doctrine, explaining that the doctrine should play no role whatsoever in the exercise of the judicial review power, it is nevertheless a more honest approach to overruling cases that lack judicially manageable standards. *See, e.g.*, Martin H. Redish, *Judicial Review and the 'Political Question,'* 79 Nw. U. L. Rev. 1031, 1033 (1984).

Some scholars even argue that the political question doctrine no longer exists. *See, e.g.*, Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 336 (2002) (exploring danger of current Supreme Court's utter disregard for political question doctrine).

B. Garcia v. San Antonio Metropolitan Transit Authority

In *Garcia v. San Antonio Metropolitan Transit Authority*,[152] the Court questioned the extent to which judges should regulate the allocation of power between state and national governments. *Garcia* overruled *National League of Cities v. Usery*,[153] which defined the scope of Congress's Commerce Clause powers based on the concept of traditional governmental functions.[154] *Garcia* reversed the *National League* case primarily on the grounds that the "traditional government functions" test did not give courts guidance.[155]

The problem with *National League* is best revealed by a survey of the various cases that lower courts decided fell within the "government functions" rule, which could not be clearly distinguished from those falling outside the rule.[156] The *Garcia* Court declared that "[t]he constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best."[157] In *Garcia*,

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152 469 U.S. 528 (1985).

153 426 U.S. 833 (1976).

154 The underlying issue in *Garcia* was the extent to which employees of state and local governments could be subjected to the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). *Garcia*, 469 U.S. at 554. The Court rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.* at 546–47. Furthermore, the Court found no constitutional violation involved in the application of the FLSA to the San Antonio Metropolitan Transit Authority. *Id.* at 554.

155 For criticism of the decision, see, for example, James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1286 (1994) ("So while much of the majority opinion in *Garcia* is devoted to the 'workability' issue, what seems to have really changed is that Justice Blackmun altered his view about the propriety of the analytical assumptions that formed the basis of *National League of Cities*.").

In both *Garcia* and *National League of Cities*, Blackmun was the swing vote. For a discussion of why Blackmun changed his vote, see Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun,* Garcia*, and the Tenth Amendment*, 32 ARIZ. L. REV. 749, 766 (1990).

156 Courts held that licensing automobile drivers, United States v. Best, 573 F.2d 1095, 1102–03 (9th Cir. 1978), operating a municipal airport, Amersbach v. City of Cleveland, 598 F.2d 1033, 1037–38 (6th Cir. 1979), and performing solid waste disposal, Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1196 (6th Cir. 1981) were functions *protected* under *National League of Cities*. At the same time, courts held that regulating traffic on public roads, Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977), regulating air transportation, Hughes Air Corp. v. Pub. Utils. Comm'n, 644 F.2d 1334, 1340–41 (9th Cir. 1981), and operating a telephone system, Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700–01 (1st Cir. 1977), were not protected.

157 *Garcia*, 469 U.S. at 539. More generally, Justice Blackmun wrote, "We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." *Id.*

a federal district court concluded that municipal ownership and operation of a mass-transit system were traditional governmental functions. But, faced with the identical question, three federal courts of appeals and one state appellate court had reached the opposite conclusion. The *Garcia* Court concluded that it would no longer strike down federal statutes for intruding on "traditional functions" of state government.

National League bred these inconsistent results because it invited courts to decide the scope of traditional functions. According to Justice Blackmun's majority opinion, "The problem is that . . . [no distinction] that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society."[158] *Garcia* provided two critiques of the "traditional government functions" test, finding it: (1) unworkable in practice, and (2) unsound in principle.[159] The Court could not identify limits on the scope of the Commerce Clause by creating standards for "traditional governmental functions" because this was not the Court's task.[160]

National League's deeper problem, beyond lower court inconsistencies, was that it gave courts inappropriate authority and trespassed on other branches of government. Judicial intervention was not necessary because states could adequately protect their own sovereignty within the political process through, among other things, their representation in Congress.[161]

C. Vieth v. Jubelirer

Similarly, in *Vieth v. Jubelirer*,[162] a plurality of the Court applied the unworkability doctrine to address the issues in *Davis v. Bandemer*[163] when it could just as easily have used nonjusticiability.

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158 *Id.* at 545–46.

159 *Id.* at 546.

160 *Id.*

161 The *Garcia* majority noted that the federal government had also bestowed many benefits upon local and state governments, and "[t]his evenhandedness was considered conclusive evidence that state interests were adequately protected within the federal political process." Wayne O. Hanewicz, *New York v. United States: The Court Sounds a Return to the Battle*, 1993 WIS. L. REV. 1605, 1610 (discussing *Garcia*, 469 U.S. 552–54).

162 541 U.S. 267 (2004).

163 478 U.S. 109 (1986). Although some may interpret *Vieth* as not overruling *Bandemer*, the four-Justice plurality agreed that the *Bandemer* standard had proven unmanageable. Justice Scalia's plurality opinion would have overruled *Bandemer* and declared political gerrymandering claims nonjusticiable: "[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." *Vieth*, 541 U.S. at 281.

Justice Kennedy, who provided the swing vote, suggested that "the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Pro-

The *Bandemer* Court held that political gerrymandering claims are justiciable, but could not agree upon a standard for assessing them. A four-Justice plurality of the *Vieth* Court concluded that no judicially discernible and manageable standards for adjudicating political gerrymandering claims exist.[164] Concurring in the judgment, Justice Kennedy agreed that the complaint had to be dismissed, but would not foreclose all possibilities of judicial relief: If a limited and precise rationale were found to correct an established violation of the Constitution in a redistricting case, he would consider providing relief.

Both *Garcia* and *Vieth* concerned the same underlying problem—the inability of the Court to find a proper role for judicial intervention. The unadministrability of the remedial scheme raised questions about whether the issue itself was one for the courts to address.

CONCLUSION

The Court has not given meaning to the unworkability doctrine. Examination of the cases in which the Court relies on the unworkability doctrine reveals that the doctrine does not offer coherent reasons to depart from stare decisis; rather, it seems like a conclusion that a case should be overturned. One cannot apply unworkability and analyze it according to neutral principles. Establishing a more principled approach to stare decisis entails abandoning the unworkability doctrine.

In several cases, lower courts may have been confused about the substantive law underlying the precedent. In this realm, confusion has no normative force and should not be enough of a reason to overrule. Confusion only means that the Court has not fully elaborated the precedent.

In *Garcia* and *Vieth*, however, the Court faced second-order remedial questions that concerned the institutional competency of courts because no judicially manageable standards existed. In cases posing similar institutional competency concerns, the Court can rely on the doctrine of nonjusticiability rather than appealing to

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tection Clause." *Id.* at 315. He voted to affirm the dismissal because he could not as yet discern a workable test for adjudicating political gerrymandering claims. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 558 (2004).

164 The "four dissenting justices offered three different doctrinal frameworks for addressing partisan gerrymandering; four justices concluded the problem was simply judicially unmanageable; but Justice Kennedy pleaded for help in constructing a workable judicial standard on the subject." Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 689 (2004).

unworkability. In these cases, lower court confusion may be a consequence—not the definition—of nonjusticiability.